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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SELINA KEENE, MELODY FOUNTILA,
MARK MCCLURE,
Plaintiffs,
v.
CITY AND COUNTY OF SAN
FRANCISCO; LONDON BREED, Mayor of
San Francisco in her official capacity;
CAROL ISEN Human Resources Director,
City and County of San Francisco, in her
official capacity; DOES 1-100,
Defendants.

) Case No.: 4:22-cv-01587-JSW
)
) **OPPOSITION TO DEFENDANT'S**
) **ADMINISTRATIVE MOTION TO**
) **ENLARGE TIME AND TO ALLOW**
) **EXPEDITED DISCOVERY**
)
)
) Date: July 30, 2023
) Time: 9:00 AM
) Judge: The Honorable Jeffrey S. White
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INTRODUCTION

2 Defendant has not informed the court exactly what facts they seek or how those facts
3 would help it in the forthcoming hearing. In other words, Defendant wants a fishing expedition in
4 the vain hope something favorable to its cause might be found. Failing to exercise due diligence
5 during the course of this litigation, Defendant now wants to conduct expedited discovery and to
6 re-litigate issues it should have raised before the District Court entered its initial ruling. Defendant
7 herein misrepresented the current Plaintiffs' motion as one for a preliminary injunction, when in
8 fact it is simply requesting the Court to enter an order based on the Ninth Circuit's Memorandum
9 (an order that no one knows will be favorable to the Plaintiffs or not). Defendant's own authority
10 establishes that such an effort to re-litigate issues related to the underlying PI motion is
11 inappropriate. There is no good cause for expedited discovery, because the discovery being sought
12 is not narrowly tailored to obtain information relevant to a preliminary injunction determination
13 and instead goes to the merits of the Plaintiffs' claim. *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d
14 1063, 1064 (C.D. Cal. 2009). The issue before this Court is one of law only—no amount of fact
15 discovery now can or should influence the Court's decision to enter an order pursuant to the Ninth
16 Circuit's Memorandum.

17 As shown herein, the Defendant, by its Motion, seeks to have the Court ignore its lack of
18 due diligence. Defendant failed to request expedited discovery prior to the original hearing on the
19 PI motion or even thereafter. Continuing its lack of diligence, Defendant failed to move the Ninth
20 Circuit to augment the record and failed to appeal to an en banc panel. In its current Motion it has
21 misrepresented the evidence and arguments contained in the papers submitted in support of the PI
22 motion and on appeal. For these reasons, and the fact that the Defendant’s case cites are
23 distinguishable and inapposite, the Court should deny Defendant’s Administrative Motion.

ARGUMENT

25 I. Defendant has misrepresented the timeline in Plaintiffs' PI motion.

26 Plaintiffs' claims for reinstatement did not accrue until they were finally forced to retire on
27 April 1, 2022. It is simple logic: one cannot get a job back before it is lost. *See*, 3-ER-273, ¶¶ 18-

1 19; 3-ER-276, ¶ 12. By simply referring to the filing date of their complaint (page 3, line 1 of
 2 Defendant's Motion), Defendant, in the hope of re-litigating the timing of Plaintiffs' PI motion,
 3 has intentionally misled the Court into thinking that Plaintiffs' PI motion was filed late. It was not;
 4 however, even if it was, the Court should be loath to withhold relief on that ground. *Lydo Enters.,*
 5 *Inc. v. City of Las Vegas*, 745 F 2d 1211, 1213 (9th Cir. 1984). Further, the District Court did not
 6 raise this issue in its order, indicating it was not a significant issue, and should not be used as an
 7 excuse to influence the Court now.

8 II. Defendant has misrepresented the supporting evidence submitted with Plaintiffs' PI motion.

9 Defendant's claim of conclusory declarations in support of the PI motion is nonsensical
 10 (page 3, line 3 of Defendant's Motion). Apparently, Defendant has not read the Declaration of
 11 Russell Davis in Support and attached exhibits (3-ER-241-269), nor has it read the Declaration of
 12 Jayanta Bhattacharya (3-ER-278-337). *See also*, Declaration of Russell Davis in Reply (3-ER-42-
 13 50) and the Notice of Lodgment (3-ER-51-92). The declarations of the Plaintiffs establish their
 14 sincerely held religious beliefs (3-ER-272; 3-ER-275). Such sincerity was proven by the fact they
 15 choose their faith over their careers—a Hobson's choice they should never have been forced to
 16 make in the first place. As a matter of law a violation of a civil rights statute (Title VII) is
 17 presumptively irreparable harm which the Court was duty bound to find irrespective of briefing.
 18 No amount of fact discovery will change that.

19 III. Defendant's case cites actually support the Plaintiffs' argument herein.

20 *Stanley v. University of S. Cal.*, 13 F.3d 1313, 1325-1326 (9th Cir. 1994), is a Defendant's
 21 case cite that is favorable to the Plaintiffs. The court denied Stanley's motion for PI on her claims
 22 of sex discrimination and retaliation. She asserted that the district court erred in not providing her
 23 an opportunity to conduct discovery. The Ninth Circuit disagreed. Much like the Defendant
 24 herein, Stanley did not file a request for a continuance in order to complete discovery before the
 25 hearing on the motion. The opportunity to conduct discovery was not denied; Stanley, and this
 26 instant Defendant, simply did not avail themselves of discovery prior to the hearing on the PI
 27 motion. Nothing precluded the Defendant from conducting discovery prior to the hearing on the

1 preliminary injunction. Defendant could have moved, *ex parte*, for an order shortening time within
 2 which to conduct depositions. The Defendant is asking this Court to make up for its own lack of
 3 diligence. Not only that—Defendant is seeking to take multiple depositions of the Plaintiffs and
 4 subjecting them to an eleven (11) hour ordeal. The Court should reject its late filed request.

5 In *U.S. v. Kellington*, 217 F.3d 1084 (9th Cir. 2000), the defendant appealed from a final
 6 judgment, not a PI. A PI merely keeps the status quo ante, a final judgment forecloses further
 7 litigation absent an appeal. After being convicted of destroying documents, Kellington moved for
 8 a judgment of acquittal and a new trial. The judgment of acquittal was granted, but the court failed
 9 to rule on the new trial motion. The government appealed, and the circuit court reversed and
 10 remanded. On remand, the issue was whether the new trial motion was to be granted. The Ninth
 11 Circuit ruled that the district court was not foreclosed in addressing a new trial motion. The district
 12 court granted the motion for a new trial because it had failed to enter an order on that motion
 13 initially. The circuit court agreed. Nothing in that case points to allowing after the fact expedited
 14 discovery in this matter.

15 In *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir.1986), the defendant appealed a
 16 judgment in favor of the government regarding mishandling of food stamps. The case concerned
 17 whether the defendant, on remand, could amend his complaint against the government. The court
 18 ruled, “Absent a mandate which explicitly directs to the contrary, a district court upon remand can
 19 permit the plaintiff to file additional pleadings, vary or expand the issues.” *Id.* Notably, the
 20 decision concerned a remand after final judgment that was overturned, not a PI motion. Nor is
 21 there anything in the decision that would allow a partial deposition or additional fact discovery. In
 22 that regard, the Defendant has misrepresented the import of the full email dialogue between
 23 counsel. An email sent to Defendant’s counsel showed that an issue Plaintiffs’ counsel was
 24 concerned with was the Defendant’s proposal for a “partial deposition,” i.e., subjecting his clients
 25 to more than the one deposition normally allowed per party. In its proposed order, Defendant is
 26 asking for four (4) hour partial depositions and seven (7) hour full depositions of the Plaintiffs.
 27 Plaintiffs should not have to suffer such abusive discovery tactics, especially since Defendant has

1 not told the Court what fact discovery it needs or how that discovery would influence the Court's
 2 order.

3 *Stevens v. F/V Bonnie Doon*, 731 F.2d 1433, 1436 (9th Cir.1984) was a case in admiralty
 4 law concerning the issue of damages. Plaintiffs' PI motion did not contain a word about damages,
 5 and this case is simply not applicable to the facts before this Court.

6 *Olds v. Jenkens & Gilchrist, P.C. (In re Hallwood Energy Partners, L.P. Sec. Litig.)*, 90
 7 Civ. 1555 (JFK), 93 Civ. 0565 (JFK), 1994 U.S. Dist. LEXIS 9331 (S.D.N.Y. July 8, 1994), is a
 8 district court case from New York. That court granted a motion to limit the scope and duration of a
 9 deposition of a third-party witness, because the witness had been previously deposed. The prior
 10 deposition was brief (not four hours) and there had been considerable document discovery since
 11 that time. In this matter, document discovery has just started, and Plaintiffs question the authority
 12 of a New York district court case in this matter, especially since it concerns a witness, not a party,
 13 and deals with discovery after document production, something that has not happened herein.

14 In *Citizens for Quality Educ. San Diego v. San Diego Unified Sch. Dist.*, No. 17-cv-1054-
 15 BAS-JMA, 2018 U.S. Dist. LEXIS 35756 (S.D. Cal. Mar. 5, 2018), that court granted the
 16 plaintiff's motion for expedited discovery *before* its motion for PI was heard. Herein, Defendant
 17 is asking for expedited discovery *after* the PI motion was ruled on and after the Ninth Circuit filed
 18 its Memorandum.

19 In *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1064 (C.D. Cal. 2009), another of
 20 Defendant's cites favorable to the Plaintiffs, the court found that the plaintiff did not show good
 21 cause for granting expedited discovery because the discovery sought was not narrowly tailored to
 22 obtain information relevant to a preliminary injunction determination and instead went to the
 23 merits of plaintiff's claims. Much like the case herein, the broad-based discovery sought by the
 24 Defendant would be more properly pursued within the structure and supervision afforded by a
 25 court-ordered scheduling order. Moreover, Defendant has not detailed the type of information it
 26 expects to discover. The type of broad-based fishing expedition it seeks is not suitable herein. *See*

1 also, *Wilcox Indus. Corp. v. Hansen*, 279 F.R.D. 64, 68 (D.N.H. 2012) (expedited discovery not a
2 right).

3 Defendants cite *Mut. of Omaha Bank v. Huntington*, 597 F. Supp. 2d 1213 (D. Nev. 2009),
4 for the proposition that there may be more than one deposition taken of each Plaintiff. However,
5 that case concerned the takeover of a bank by the FDIC and concerns motions to dismiss.
6 Plaintiffs are unable to discern the application of that case, as depositions are not mentioned.

7 IV. There is no prejudice to the Defendant because there are other procedures available to it.

8 No one knows what the Court will order. Defendant's Administrative Motion will be moot
9 if this Court does not rule favorably for the Plaintiffs. If Plaintiffs obtain a favorable order, the
10 better procedure would be to conduct discovery expeditiously and then move to vacate the order if
11 such discovery can elicit grounds for so doing, such as intrinsic or extrinsic fraud.

12 CONCLUSION

13 Defendant has failed to establish good cause to grant its Motion. There are no grounds
14 herein to grant Defendant's Motion. There are no grounds herein to reward the Defendant's lack of
15 diligence in pursuing discovery prior to the entry of the PI order, and even less reason to grant it
16 after the Ninth Circuit's ruling. However, and out of an abundance of caution, if this Court should
17 grant the Defendant's Motion, it should also apply to the Plaintiffs. In other words, Plaintiffs
18 should be allowed to take multiple depositions of the Mayor, the HR Director, and the Chief
19 Medical Officer of the Defendant (sauce for the goose is sauce for the gander). Irrespective, the
20 total amount of deposition time should be limited to seven (7) hours for each witness or party,
21 whether Defendant's or Plaintiffs' deponents. Those depositions should be taken at one time, i.e.,
22 no partial depositions.

23 Dated: June 30, 2023

24 /s/ Russell Davis

25 Russell Davis
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26 *Attorney for Plaintiffs*